4-22-1976

Eugene Miller v. Ethel Louise Miller

Appellee's Brief 1976-SC-0221

APPELLEE'S BRIEF

Supreme Court of Kentucky

FILE NO. 76-221

EUGENE MILLER,
Defendant-Appellant,

vs.

ETHEL LOUISE MILLER,
Plaintiff-Appellee.

Appeal From Campbell Circuit Court
Division No. Two
Hon. Thomas F. Schnorr, Judge

BRIEF OF APPELLEE

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I hereby certify that a true and correct copy of the within Brief has been mailed to Hon. Howell W. Vincent, 130 Park Place, Covington, Kentucky 41011, Attorney for Defendant-Appellant, and Hon. Thomas F. Schnorr, Judge of Campbell Circuit Court, Courthouse, Newport, Kentucky 41071, this 22 day of April, 1976.

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STATEMENT OF QUESTIONS PRESENTED

The Plaintiff-Appellee (hereinafter referred to as Appellee) feels that the questions were not correctly stated by the Appellant and, therefore, different or additional questions will be discussed in this Brief and they are as follows:

(1) MAY A CONTRACT FOR THE SALE OF REAL ESTATE PROVIDING FOR PAYMENT OF THE PURCHASE PRICE IN INSTALLMENTS, PLUS AD VALOREM TAXES AND INSURANCE PREMIUMS, BUT CONTAINING NO PROVISIONS AUTHORIZING RESCISSION OR MAKING TIME OF

THE ESSENCE, BE RESCINDED BY SELLER WHEN THE BUYER, AFTER DEMAND BY THE SELLER: (1) ALLOWS THE INSURANCE ON A STRUCTURE TO BE CANCELLED FOR NONPAYMENT OF PREMIUM, AND (2) ALLOWS THE COUNTY REAL ESTATE TAX TO BECOME DELINQUENT?

The Court below held that seller could rescind in such a situation and the Appellee contends that the holding should be affirmed.

(2) WHERE BUYER HAS BREACHED TWO OF THE THREE SPECIFIED OBLIGATIONS PLACED UPON HIM BY A CONTRACT TO PURCHASE REAL ESTATE, AND RECEIVES NOTICE OF RESCISSION OF THE CONTRACT FROM THE SELLER, WHAT IS THE EFFECT, IF ANY, OF BUYER'S SUBSEQUENT TENDER OF FULL PERFORMANCE OF HIS OBLIGATIONS UNDER THE CONTRACT?

The Court below held that such action by buyer had no legal effect and the Appellee contends the holding should be affirmed.

COUNTER-STATEMENT OF THE CASE

The Appellee counterstates the case to advise the Court of essential facts which may be difficult to glean from the pleadings recited by Appellant in his Statement of the Case.

On December 3, 1971, the parties to this action entered into a contract to buy and sell real estate with the Appellee as seller and the Appellant as buyer. The obligations of the buyer were (1) payment of purchase price in installments (2) payment of property taxes for the year

1972 and thereafter, (3) fire insurance in the amount of $2,000.00 on the barn located on the subject real estate. (The contract appears as Exhibit 2 to Transcript of Evidence (T.E.)).

Although the parties had some dispute about the payment of the purchase price (T.E., p. 25), it is not contended that the buyer has breached the provision of the contract relating to the payment of principal and interest.

The evidence indicated that buyer, after six or eight demands by seller (T.E., p. 7 & 8) failed to pay the insurance premium on the barn on the subject real estate and the policy was cancelled (T.E., p. 8 & 9).

It is alleged by the Appellant that only $10.00 was due on the insurance premium but the evidence would indicate that since the insurance was almost $50.00 per annum (T.E., p. 31) and the last payment was made in March (apparently 1974) that more than $10.00 of the annual premium was owed on November 18, 1974 when the rescission occurred. It is an undisputed fact that the policy was cancelled for nonpayment of premium on July 11, 1974 (T.E., p. 8 & 9 and Exhibit 4 to T.E.).

The evidence further indicated that buyer, after demand by the seller, (T.E., p. 10) allowed the County property taxes to become delinquent (T.E., p. 11) and risked a sale of the tax bill at the Courthouse steps in April, 1974 (Exhibit 5 to T.E.). It is not disputed that the 1973 taxes were delinquent when the notice of rescission was mailed to buyer in November, 1974.

With the factual situation being as stated above, i.e., the insurance policy cancelled, and the 1973 taxes delinquent, the seller, through her attorney, notified buyer that she "does hereby rescind" the contract of December 3, 1971 (Exhibit 8 to T.E.).

The buyer received the notice on the 18th day of November, 1974 and on the following day he presented himself at the office of the seller's attorney and asked when he could do to make amends (T.E., p. 42). The buyer then proceeded to pay the delinquent tax and purchase another insurance policy (T.E., p. 53 & 54).

This action was filed by seller on November 21, 1974 (Record (R) p. 2) and since that time buyer has tendered the installments of principal and interest, in full, and the same are held by the Campbell Circuit Court Clerk (Exhibits B, C, D, & E. to T.E.).

The Appellee seeks rescission of the contract. The Appellant, by counter-claim, seeks specific performance of the contract.

The Court referred the matter to the Master Commissioner (R., p. 15) and, there being no objection by either party, the Master took the evidence and reported.

The report of the Master speaks for itself and is in the record and need not be set forth here. In summary, it recommends that the contract of the parties be rescinded (R., p. 21-24).

The Findings of Fact, Conclusions of Law and the Judgment of the Court is also in the record and speaks for itself. It orders the Contract rescinded. The Court adopts the report of the Master with the exception that the Court ordered the seller to return all installments of principal and interest to the buyer, there being no proof by the seller of rental value of the property (R., p. 35 & 36).

It is upon the above factual situation and status of the record that this matter is submitted to this honorable Court.

ARGUMENT

I. DISCUSSION OF APPELLANT'S QUESTION 1 AND 2.

(1) MAY A CONTRACT FOR SALE OF REAL ESTATE PROVIDING FOR PAYMENT OF THE PURCHASE PRICE IN INSTALLMENTS PLUS AD VALOREM TAXES AND INSURANCE PREMIUMS BE RESCINDED BY VENDOR FOR LATE PAYMENT OF INSURANCE PREMIUM IF $10.00 BY VENDEE WHERE SALE CONTRACT CONTAINED NO PROVISION FOR RESCISSION NOR ANY PROVISION FOR ACCELERATION OF MATURITY OF INSTALLMENTS DUE IN EVENT OF DEFAULT? THE COURT BELOW ANSWERED "YES". THE APPELLANT CONTENDS THE ANSWER SHOULD BE "NO".

(2) DOES THE DEFAULT OF VENDEE (AT BAR, LATE PAYMENT OF INSURANCE PREMIUM OF $10.00) IN PAYMENT OF ITEM CALLED FOR IN CONTRACT FOR SALE OF REAL ESTATE ENTITLE THE VENDOR TO HAVE A RESCISSION WHERE TIME IS NOT ESSENCE OF CONTRACT AND CONTRACT CONTAINS NO PROVISION AUTHORIZING RESCISSION FOR SUCH CAUSE? THE COURT BELOW ANSWERED "YES". APPELLANT CONTENDS THE ANSWER SHOULD BE "NO".

The Appellee is aware of her obligation under RAP 1.210 to respond to the Appellant's arguments as they are presented in his Brief.

Question 1 and Question 2 of Appellant's Brief discuss whether or not rescission of the subject contract can be permitted under the fact situation at bar. Since this issue is fully discussed in Section IV of this Brief, we would respectfully refer the Court's attention to that discussion. There the issue is fully dealt with.

It should be pointed out that the Appellant's Question 1 and Question 2 make no reference to the important issue of the delinquent property taxes as an item of breach of contract by the buyer. This is a matter of at least equal importance with the breach relating to the nonpayment of the insurance premium.

II. DISCUSSION OF APPELLANT'S QUESTION 3.

(3) SHOULD FORFEITURE OF CONTRACT FOR SALE OF REAL ESTATE BE STRICTLY CONSTRUED AGAINST PERSON BENEFITTED THEREBY? THE COURT BELOW ANSWERED "NO". APPELLANT CONTENDS THE ANSWER SHOULD BE "YES".

The *Kochum* v. *Ezell* opinion cited by Appellant (211 Ky. 427, 277 S.W. 497 (1925)) holds that a forfeiture provision in a contract is construed against the one benefited thereby. This case is not applicable in the case at bar because here the Court, not the contract, declared the forfeiture.

III. DISCUSSION OF APPELLANT'S QUESTION 4.

(4) WHERE, AS HERE, VENDOR IN CONTRACT FOR SALE OF REAL ESTATE HAS BEEN FULLY COMPENSATED FOR MINIMAL BREACH BY VENDEE OF TERMS THEREOF, WILL EQUITY RELIEVE AGAINST A FORFEITURE? THE COURT BELOW ANSWERED "NO". APPELLANT CONTENDS THE ANSWER SHOULD BE "YES".

The Appellant, in his Question 4, apparently argues that tender of performance, after default, should retroactively cure the default. This is fully dealt with in Appellee's Section V hereunder and to avoid repetition will not be discussed at this point in the Brief. The Court's attention is directed to Section V.

IV. DISCUSSION OF APPELLEE'S QUESTION 1.

(1) MAY A CONTRACT FOR THE SALE OF REAL ESTATE PROVIDING FOR PAYMENT OF THE PURCHASE PRICE IN INSTALLMENTS, PLUS AD VALOREM TAXES AND INSURANCE PREMIUMS, BUT CONTAINING NO PROVISIONS AUTHORIZING RESCISSION OR MAKING TIME OF THE ESSENCE, BE RESCINDED BY SELLER WHEN THE BUYER, AFTER DEMAND BY SELLER, (1) ALLOWS THE INSURANCE ON A STRUCTURE TO BE CANCELLED FOR NONPAYMENT OF PREMIUM, AND (2) ALLOWS THE COUNTY REAL ESTATE TAX TO BECOME DELINQUENT?

The Appellant, in his Brief, does not contend that there

is any inconsistency between the evidence presented and the Findings of Fact of the Court. The appeal is apparently confined to questions of law.

The Findings of Fact filed by the Campbell Circuit Court set forth the provisions of the contract and the condition of the subject real estate and further state, in pertinent part: (R., p. 35)

4. The buyer kept the installments current but allowed the tax for one year to become delinquent.
5. The buyer permitted the insurance on the barn to lapse.
6. The seller rescinded the contract and notified the buyer.
7. The buyer offered to repay the seller the premium that seller paid to reinstate the insurance and also pay the tax and kept the payments current and also offered to pay the entire purchase price and tendered the same to the seller, who refused and the buyer thereupon paid his full obligation into Court.
8. The seller filed action to enforce the rescission.
9. That the provisions of the contract concerning taxes and insurance were material parts of the contract.

C.R. 52.01 provides in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a commissioner, to the extent that the court adopts them, shall be considered as findings of the court."

In view of the above quoted Civil Rule and also in view of the fact that the Appellant does not challenge the find-

ings of the trial court, it is submitted that the law to be applied and the questions to be answered in this case must be based upon the findings set forth in the record.

The findings clearly indicate that there was a "breach" of the contract.

> "The word 'breach', as applied to contracts, is defined as a failure without legal excuse to perform any promise which forms a whole or a part of the contract, including the refusal of a party to recognize the existence of the contract or the doing of something inconsistent with its existence." *17 Am. Jur. 2d, Contracts* § *441.*
>
> "A 'breach of a contract' is the commission of an act, or the omission of some act, specified or implied in the contract." *Dulworth* v. *Hyman,* Ky., 246 S.W. 2d 993, 995 (1952).

After breach by one party, the other party, not being in default, may be entitled to rescind the contract. Appellee submits to the Court that in this action the rescission took place when she notified the buyer that the contract was rescinded on November 18, 1974 at which time the buyer was in default for non-payment of taxes and insurance.

> "The failure of a party to perform his part of a contract does not per se rescind it; the other party must manifest his intention to rescind. If the intention is manifested by a notice, the notice must be clear and unambiguous, conveying an unquestionable purpose to insist on the cancellation. A formal written notice is not necessary, however, although the law requires, on the part of him who would rescind, some positive act which shows such an intention." *17 Am. Jur. 2d, Contracts,* § *509.*

So clearly there was a breach and clearly there was a manifestation of the seller's intent to rescind the contract

which was conveyed to the buyer. This brings us to the "gut issue" of this case, that being whether or not rescission was the proper remedy in this particular case. This issue must be answered by deciding whether the breach was "material", or, stated otherwise, whether "nonperformance" was substantial.

The Court below found the breach to be both material and substantial and the finding is unchallenged by the Appellant.

The well reasoned opinion of the trial court points out the basis for the holding that the "taxes and insurance" provisions of the Contract were material.

> "A seller who cannot rescind in the event of a default could be required to seek relief by legal action for parts of the Contract in default by the buyer and at the same time, deal with the buyer concerning the parts of the contract that buyer is willing to perform. In the meantime, each failure of the buyer, such as the failure to pay taxes or insurance premiums, could jeopardize the interest of the seller in the real estate. If the seller does not choose to continue this unfortunate state of affairs after the buyer defaults, it is equitable for the seller to put an end to the transaction and put the parties in the same position they were in prior to contract." (R., pp. 33 & 34)

It is submitted respectfully that the "taxes and insurance" provision in the contract is at least as important (if not more important) than the principal and interest payments. Failure to insure the barn could result in a substantial financial loss to the value of the real estate. Failure to pay the property taxes jeopardizes the seller's interest in the real estate by creating a lien on it. On the other hand, default in the payment of principal and interest cannot cause irreparable damage to the seller's interest in the legal or physical condition of the subject real estate.

So long as the taxes and insurance are kept current on the property the seller can be assured that, in the event of any default by the buyer, she will be able to reclaim the property at substantially the same value as it was when the contract was entered into. The failure of the buyer to maintain the insurance and the taxes could result in substantial losses to the seller and this must have been considered by the parties when the contract was entered into and these provisions clearly were a very material part of the contract.

The seller has a very substantial interest in seeing that the "taxes and insurance" provisions of the contract were complied with and could rescind for noncompliance after numerous demands were made upon the buyer.

It has been recognized, in this Commonwealth, that the seller on a real estate purchase contract can rescind if the buyer performs only in part. In *Johnson* v. *Johnson,* 125 S.W. 1097 (1910), the facts show that the seller contracted to sell upon the following conditions: (1) payments, by the buyer, of the seller's debt; and (2) comfortable support and home in which the seller could live. After trial, the court ordered that the contract be rescinded because the evidence showed that, although the seller was provided with a home in which to live, he was not sufficiently clothed or fed. In addition, the evidence showed that the buyer had only paid part of the seller's debt which was part of the consideration for the purchase price of the property.

In other words, the evidence in the case showed that the buyer had partially performed the conditions which he had promised as consideration for the purchase of the property.

Although the Court of Appeals did not specifically state their reasoning for rescission of the contract, the concern

for the extent of performance of the buyer's obligations indicates that the buyer's case would either stand or fall based upon the materiality of the breach and, as a factual matter, the Court determined the breach to be material and thus rescission followed.

A recent treatise, HANDBOOK ON THE LAW OF REMEDIES, D. DOBBS, (West Publishing Company, 1973) which has been favorably reviewed (BERTELSMAN, BOOK REVIEW, 62 Ky. L.J. 1169 (1974)) and frequently cited (for example, GERMAIN, THE KENTUCKY LAW SURVEY-REMEDIES, 63 Ky. L.J. 777 at 796, et seq. 1975) contains the following dissertation regarding the subject matter of this appeal at § 12.12.

> 12.12 VENDOR'S REMEDIES FOR PURCHASER'S RESCISSION AND RESTITUTION.
>
> EXECUTORY CONTRACT. Where the purchaser breaches his executory contract to purchase land, the vendor is entitled to treat his obligation to convey as discharged if he prefers to do this rather than to seek damages or specific performance. Courts usually refer to this as rescission, but in some states the vendor is allowed to keep both the land and any payments made by the purchaser toward the purchase price as damages. In cases of this sort, the vendor is not getting merely a rescission, which requires him to restore any payments made by the purchaser, but instead getting damages for breach of contract.
>
> Where the vendor rescinds for breach of contract by the purchaser, the vendor is entitled to a clear title to his land being under no further obligation to convey it, and he is entitled, if the contract was a matter of public record, to quiet title or to get a judicial declaration of rescission so that the cloud represented by the contract can be removed.
>
> Rescission is not granted, even when the contract is executory, where the breach is immaterial, trivial or

> merely technical. For example, rescission is not granted for a short delay by the purchaser in paying the price, unless time was made of the essence. A substantial breach is found, however, and rescission permitted, where the purchaser fails to pay the purchase price after a longer delay, or after notice of default in which he is given a reasonable time to make the payments, or where time is of the essence.

As we understand the arguments of the Appellant, he asserts that time was not of the essence in the contract, that the contract had no provision for default and therefore, there should be no rescission in this case.

We agree that if the contract had provided that "time is of the essence" or specifically provided for a remedy upon default by the buyer then there would be no issue in this case.

However, we submit that it cannot be argued that the failure of the contract to provide a remedy prevents a court from providing a remedy when the evidence indicates that there has been a breach.

> ". . . failure of the purchaser to perform a covenant or condition in his contract, after the lapse of a reasonable time where no time for performance is fixed, or within the time fixed by the contract, may permit the vendor to rescind. However, it has been held that the vendor cannot rescind the contract where the purchaser has substantially complied therewith . . ." *91 C.J.S. Vendor and Purchaser,* § *132.*

We, therefore, conclude that the "gut issue" of this case is the materiality of the breach and the lower court has determined that the breach was, in fact, material after considering all pertinent factors and after reviewing the evidence and the discretion of the lower court in making this decision should be upheld.

V. DISCUSSION OF APPELLEE'S QUESTION 2.

(2) WHERE THE BUYER HAS BREACHED 2 OF THE 3 SPECIFIED OBLIGATIONS PLACED ON HIM BY A CONTRACT TO PURCHASE REAL ESTATE, AND RECEIVES NOTICE OF RESCISSION OF THE CONTRACT FROM SELLER, WHAT IS THE EFFECT, IF ANY, OF BUYER'S SUBSEQUENT TENDER OF FULL PERFORMANCE OF HIS OBLIGATIONS UNDER THE CONTRACT?

The decision of the issue submitted in the Appellee's Question 1 above would seem to dispose of this issue also but since the Appellant seems to place a great reliance upon the fact that he tendered performance after he received the notice of rescission we shall briefly deal with this issue.

If the seller was entitled to rescind the contract in this case, i.e., if Appellee's Question 1 above is answered in the affirmative, then, we submit, the rescission notice, when received by the buyer, would terminate the contractual relationship between the parties. It would logically follow that a subsequent tender of performance by the buyer would be without legal effect.

> "... the first party guilty of a breach of contract cannot complain if the other party thereafter refuses to perform. Am. Jur. Vol. 12, Contracts, § 338."
>
> *Dalton* v. *Mullins,* Ky. 293, S.W. 2d 470, 476 (1956).

CONCLUSION

If anyone "wuz robbed" in this matter, it is the Appellee. She entered into a contract to sell real estate, in good faith, and anticipated that the purchaser would pay her for the property, which he did, and that he would also assume the property taxes and keep the barn on the property insured, which he did not. Instead of the nice, orderly performance of the contract which she had anticipated, she has experienced the aggravation of worrying about her tax bill being purchased at the courthouse steps, her uninsured barn burning down, and numerous calls to the Appellant to notify him to pay for these matters. She has also received a trip to the Supreme Court of Kentucky, by way of the Campbell Circuit Court, with the associated legal fees and court costs which was also not anticipated by her when she entered into the contract.

The repentent purchaser now seeks to have this Court of equity protect him because he has properly performed the contract since it became apparent to him that the seller would take legal action to enforce her rights. This Court should affirm the decision of the Campbell Circuit Court and thus indicate to the buyer that it is a useless act to close the barn door (of the uninsured barn) after the horse is already out.

Respectfully submitted,

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